

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re
CITY OF DETROIT, MICHIGAN, Chapter 9
Debtor Case No. 13-53846
Hon. Steven W. Rhodes

THOMAS STEPHENS' SUPPLEMENTAL RESPONSE AND OBJECTIONS

Thomas Stephens, pursuant to the Court's grant of leave to supplement timely objections filed on August 19, 2013 (attached), as stated on the record of the proceedings on September 19, 2013, says as follows:

Overview

Petitioner submits this supplement to address the following three (3) points arising out of the hearing on September 19, 2013 and the issues pertaining thereto:

1. Adjudicating the constitutional claims and issues in the pending Phillips and NAACP cases challenging the constitutionality of Michigan Public Act 436 and related issues should take precedence over this Chapter 9 Bankruptcy proceeding, which should be stayed to allow further proceedings in the pending cases;
2. In weighing the balance of justice involved in such a stay, the nature of the underlying socioeconomic issues involved in the City of Detroit's restructuring, and the larger agenda behind the bankruptcy, emergency management and restructuring, further support the necessity for and the appropriateness of a reasonable stay of the bankruptcy; and
3. The fear and anxiety of current pensioners as a result of application of the state's emergency management policies will not be aggravated or prolonged by a reasonable stay of this Chapter 9 bankruptcy proceeding.

ARGUMENTS

I. ADJUDICATION OF PENDING CONSTITUTIONAL CLAIMS SHOULD PRECEDE BANKRUPTCY PROCEEDINGS.

It is well established that bankruptcy courts do not have any final authority to decide constitutional issues. *Farmer v. First Virginia Bank*, 22 B.R. 488 (E.D. Va. 1982). Any final decision on constitutional issues must, under the U.S. Constitution, be decided

by an Article III court. The constitutional injuries alleged by the plaintiffs in the pending litigation in the United States District Court for the Eastern District of Michigan¹ constitute irreparable harm for the duration that they are permitted to continue. See, *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); *Doe v. Duncanville Independent School District*, 994 F.2d 160 (5th Cir. 1993).

The pending *Phillips* and *NAACP* cases allege multiple constitutional violations that are made actionable against the defendants in those cases, not against the debtor City of Detroit, pursuant to 42 U.S.C. § 1983. Section 5 of 42 U.S.C. § 1983 guarantees persons the right to enforce the U.S. Constitution against those who act under color of law to deprive or cause a person to be deprived of rights, privileges, or immunities secured by the Constitution. Section 3 of 28 U.S.C. § 1333 guarantees a person the right to have a federal district court adjudicate claims brought under 42 U.S.C. § 1983. Those rights should be protected and enforced by temporarily staying this proceeding.

It is also well established that Courts have the discretionary power to stay proceedings incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. That power extends to stays pending other judicial proceedings, and does not require the issues in such proceedings to be necessarily controlling of the action before the court. *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936); *In re Latimer*, 489 BR 844 (ND Ala 2013) (The *Latimer* bankruptcy court held on March 26, 2013 that a stay of the adversary proceeding was warranted so that issues with

¹ *Phillips, et al v Snyder, et al*, Case No. 2:13-CV-11370 (Hon. George Caram Steeh), and *Detroit Branch NAACP, et al v Snyder, et al*, Case No. 13-CV-12098 (Hon. George Caram Steeh)

respect to the claims made by the debtor which were currently in arbitration could be resolved.); *Asahi Glass Co., Ltd. V Toledo Engineering Co., Inc.*, 262 F.Supp.2d 839 (ND Ohio 2003)

The pending *Phillips* and *NAACP* cases are the most important constitutional litigation in the State of Michigan – regarding the nature and scope of constitutional liberty under the rule of law and the state's powers *vis-à-vis* local representative government - in more than 140 years, since *People ex rel Leroy v Hurlbut*, 24 Mich 44 (1871), a *quo warranto* action that arose out of the state of Michigan's first attempt to take away what would later become the Detroit Water and Sewerage Department.²

The extremely lengthy opinions of Justice Cooley and Chief Justice Campbell in the historic *Hurlbut* case, written under prevailing social conditions and professional judicial standards in the second half of the 19th century, are too extensive and historically specific to parse and apply point-for-point to the specific situation currently facing this court.³ But the following judicial statements give a flavor of the opinions, and more important, inform us of the broad social and constitutional issues at stake that far exceed the scope and purposes of Chapter 9:

- Chief Justice Campbell noted “*the custom prevalent under all free governments of localizing all matters of public management, as far as possible, and of making use of local corporate agencies whenever it can be done profitably, not only in local government, where it is required by clear constitutional provisions, but also for purposes of state.*” (P. 56)

² An equally divided state supreme court in *Hurlbut* precluded that takeover. Subsequent state litigation restructured the department's governance in other ways that are not particularly material to the issues here. Mr. Hurlbut was the board chair of the entity that ultimately became the Detroit Water and Sewerage Department, and within the last few years the Board of Water Commissioners that governs the newly regionalized public utility.

³ On the other hand, Justice Christiany's statement that “*the most ignorant, and therefore the most mercenary and depraved [persons], being found mainly in the larger cities*” (P. 49) seems to indicate that, when it comes to the views of Detroit held by Lansing officials, perhaps not so much has changed after all in 142 years.

- The Chief Justice further stated: “*Incorporated cities and boroughs have always, both in England and in America, been self-governing communities within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than "investing the people of the place with the local government thereof."* (P. 70)
- And even further: “*Our constitution cannot be understood or carried out at all, except on the theory of local self-government; and the intention to preserve it is quite apparent. In every case where provision is made by the constitution itself for local officers, they are selected by local action. All counties, towns, and school districts are made to depend upon it. All elections are required to be in local divisions where electors reside. Cities are represented in the board of supervisors, and it is quite possible for their members to outnumber the rest. It certainly cannot be that the state can control those bodies by sending its own agents there, and it cannot be possible that it was contemplated that any members of that board should be selected by a different mode of election or appointment from the rest. Cities may become counties, and surely there can be no county without popular institutions. Cities have been judicially declared to come within the denomination of "townships" so far as to be entitled to library money; and unless they are made to include school districts, they need not be compelled to have free schools. No one would venture to assume that the constitution was designed to leave them in such a position. It is impossible to read that document without finding the plainest evidence that every part of the state is to be under some system of localized authority emanating from the people. This is no mere political theory, but appears in the constitution as the foundation of all our polity.*” (Pp. 72-73) (emphasis added)

But even this ringing language employed by Chief Justice Campbell pales somewhat before the opinion of Michigan’s great Justice Thomas Cooley in *Hurlbut*. Justice Cooley offered a passionate treatise on the fundamental nature of the constitutional liberty that is fatally undermined by Governor Snyder’s overreaching ‘emergency’ legislation:

- “*... [T]he question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature*

deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now, it must be conceded that the judicial decisions and law writers generally assert that the state creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent.

This I understand to be the accepted theory of state constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in any thing more than a general sense; they never are and never can be literally accepted in practice.” (Pp. 82-84)

- And continuing: “*In view of these historical facts, and of these general principles, the question recurs whether our state constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities, the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary.*

As there is nothing requiring the person appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing.

As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. ...

It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty.

The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written.

If this charter of state government which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so--if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give--this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone." (Pp. 98-102) (emphasis added)

The tradition of honoring the autonomy and legal authority of local government, in lieu of "oligarchy," has extremely deep roots as a core element of the constitutional rule of law in Michigan.

On the other hand, the assumptions and stereotypical analyses underlying the emergency management policies of the state, and their special application in Detroit, fly

directly in the face of this legal tradition. Such uncontested assumptions do not justify hastily proceeding under Chapter 9, with the constitutional and legal issues raised in the pending *Phillips* and *NAACP* cases unresolved because of the bankruptcy stay.

What is at stake in the question of sequencing the constitutional litigation and the bankruptcy proceeding is, in its own way, as broad and fundamental as the constitutional principles the Michigan Supreme Court justices debated in *Hurlbut*. Today there is a school of argument that the problems of Detroit are one-hundred percent its own making. That view is self-serving on the part of those who contributed so greatly to Detroit's fiscal crises and who now wish to blame the victim.

At no time in its history did the City Council of Detroit decide or declare that its black citizens should be prevented from living in Livonia, or Hazel Park or Grosse Pointe. Other people did decide that. At no point did Detroit's African American residents vote that they should not be allowed to become firefighters, or policemen or school teachers, or sanitation workers in Royal Oak or Birmingham or Allen Park. But that is what happened.

No Detroit officials proposed violating the Michigan Constitution by jeopardizing already earned pensions for city retirees. Officials who answer to the state government in Lansing did. Again and again, African Americans were confined in their employment, their schools and their residence below Eight Mile Road. Over and over, decisions about

the tax structure, the tax base and other sources of revenue for city government were not made in Detroit or by Detroiters.⁴

Over time, the ability of Detroiters to be ‘the captain of their own ship’ faded away, bit by bit, piece by piece. The power of government itself was eviscerated by emergency managers, private-public partnerships, regional authorities and more. This Honorable Court knows that it has come to this historic point, where Detroit did not file for bankruptcy. Officials appointed by state officials from Lansing did.

The Plaintiffs in the pending *Phillips* and *NAACP* cases should have their ‘day in court’ on their claims that this application of Public Act 436 to Detroit, via Mr. Orr and his Jones Day law firm, violates what Justice Cooley in *Hurlbut* referred to as the “*living and breathing spirit*” of constitutional protections, before this Chapter 9 proceeding renders the substance of the issues moot – or even worse “*utterly lost and gone*” - via disposition of Detroit’s assets as well as our local government’s authority. See also *City of Pontiac Retired Employees Assn v Schimmel*, CA 6 No. 12-287 (August 9, 2013) (instructing the lower courts to assess emergency managers’ actions in light of the issues raised by the Snyder administration’s serial emergency management statutes).

At an absolute minimum, considerations of judicial efficiency call for a stay of these proceedings. Otherwise the parties risk going through the time and expense of bankruptcy proceedings, only to potentially find that the emergency manager statute is illegal and unconstitutional in one or more material ways. The most efficient way to

⁴ As if to highlight the timeliness of these concerns, on Sunday, September 29, 2013, the Detroit Free Press reported extensively on over \$60 million of Detroit restructuring contracts awarded to and by Jones Day courtesy of the offices of Mr. Orr, much of it without even providing notice (effective oversight is outlawed by the emergency management statute) to local elected officials:

<http://www.freep.com/article/20130929/NEWS01/309290063/detroit-bankrupt-consulting-contracts>

handle these complex issues is to have an expedited ruling on the constitutional challenges first, before proceeding further under Chapter 9.

It has historically often been the role of the federal courts to protect citizens from abuse by state government. This is such a time. Justice for African Americans compels that this Honorable Court stay these proceedings for a reasonable time, until the Constitutional rights of Detroiters can be adjudicated.

II. THE UNDERLYING SOCIAL ISSUES IN DETROIT SUPPORT A STAY OF THIS CHAPTER 9 BANKRUPTCY PROCEEDING.

The 21st century equivalent of the constitutional panegyrics surrounding fears of “*oligarchy*” expressed in *Hurlbut* argue strongly for a stay of these proceedings, to avoid ‘putting the cart [of Chapter 9] ahead of the horse’ [of constitutional liberty] under the rule of law pursuant to Article III of the U.S. Constitution.

The scope and depth of the underlying issues in this historic situation are so great that this supplement can only touch briefly on some of the major issues, and attempt to relate them to the sense of living justice that, it is respectfully submitted, must be this Honorable Court’s touchstone.

In terms of the historical context and roots of Detroit’s current ‘restructuring,’ independent journalist and sociologist Darwin Bond-Graham recently summarized the relevant demographic history of “Killing Detroit.”

- By the late 1960s white Detroit was already staging an exodus from the city into the rapidly growing suburbs. The transformation of the US into a post-industrial services-and-knowledge economy would be seized by these well-positioned white suburbanites. Black Detroiters, still only one generation removed from the plantations of Mississippi, Alabama, Louisiana, and Georgia, lacking the social capital and racial pass card of access to economic rights, were trapped below 8 Mile Road. The rebellion of 1967 against the

city's mostly white police force and political establishment revealed the raw racism that was tearing the region's working class apart. Many white Michigan residents supported a crack-down on the Black community, unmoved by the root causes of the rioting.

In the process whites in the exurbs of the Detroit metropolitan region became one of the most affluent populations in the United States. More than half of Black Detroit found itself blocked, unable to access and afford the means of social mobility. Black Detroit became one of the poorest populations in the United States, afflicted by the social ills of violence that grow from severe inequality.

In a sense whites, and later a small group of Black middle class migrants exited Detroit with the social and economic capital they acquired at the height of the city's industrial flower. It was like a run on a bank that causes the institution to implode. Detroit's affluent residents took the human and financial capital of what was once one of the wealthiest cities on earth and they re-deposited themselves and their savings beyond the reach of the struggling city.

Because of the highly fractured system of independent local cities, counties, and revenue authorities that characterizes American government, this demographic shift translated into a permanent fiscal crisis for Detroit. Big public pension obligations, or none at all; corrupt mayors, or squeaky clean politicians; it didn't really matter. These influences on Detroit's fate weren't sufficient, nor necessary to cause the collapse. It was capital and white flight that did the city in. The tectonic shift in incomes and wealth reduced Detroit to the status of a revenue-starved city retaining all its responsibilities of social investment and a much amplified welfare load. The city was prevented from annexing nearby suburbs where retail tax dollars were being captured, and where real estate prices were rising along with family incomes. White Michigan and the new corporate community, largely ensconced in the suburban and rural regions of the state, sat back to watch the urban core burn.⁵

Similarly, critical race scholar Glen Ford of Black Agenda Report aptly characterized the intended result of the Snyder administration emergency management and Jones Day-implemented 'restructuring' as a "New American Apartheid:"

- What is emerging in the second decade of the 21st century is a new version of American Apartheid, in which the inhabitants of largely Black urban centers

⁵ <http://darwinbondgraham.wordpress.com/2013/07/29/killing-detroit/>

are denied a meaningful vote or the legal capacity to safeguard their collective and individual property from the grasping hands of the rich.

Detroit is the epicenter of the African American economic and political crisis, an 85 percent Black metropolis whose citizens have been stripped of their fundamental democratic rights so that their public assets and private pensions can be confiscated by the finance capitalist class. Wall Street now runs the city outright, through an emergency financial manager. A similar regime prevails in all of Michigan's largely Black cities, resulting in the disenfranchisement of more than half the state's Black population. In the language of declining capitalism, this is called austerity, but in America it takes the form of a racialized order in which concentrated populations of Blacks have no rights that the bankers are bound to respect.⁶

Closer to home, veteran labor journalist and media producer Frank Joyce has eloquently limned the real issues that Detroit's emergency managed-restructuring seeks to thrust behind a curtain of narrow legalism:

- Capital of all kinds is pouring into Detroit. A recent issue of Crain's Detroit Business reports on 24 new businesses that have opened in midtown Detroit in the last year. Scores more have started up in downtown and other neighborhoods too. Foundations have spent at least 2 billion dollars in Detroit in recent years. Dan Gilbert keeps closing offices in the suburbs and bringing those jobs to downtown Detroit. In some parts of the city rents are rapidly rising.⁷

The reality is that Detroit has been "governed" for some time by a dizzying array of state "emergency managers" and other state agency takeovers; private/public partnerships; private services for security, waste management, worker training and many other things formerly done by elected government and regional authorities of various kinds, not to mention many foundation invented organizations.

⁶ <http://blackagendareport.com/content/detroit-nexus-new-american-apartheid>

⁷ To cite one timely and prominent example of relevant public discourse surrounding investment and development in Detroit, on Sunday, September 22, 2013, only three days after this Court heard objections by approximately 50 Detroiters to this Chapter 9 proceeding, the Detroit Free Press and other major media published a full page advertisement signed by 28 CEOs of major corporations (attached), "HERE'S \$250 BILLION THAT SAYS THE CITY OF DETROIT HAS A VERY BRIGHT FUTURE." The piece rather boastfully and arrogantly concludes that the rich somehow speak for "The real Detroit." It is highly significant and persuasive evidence of the extremely polarizing nature of the bankruptcy and restructuring process. The pending constitutional litigation must be allowed to proceed before this bankruptcy, to avoid drowning the voices of ordinary Detroiters in the power of money.

Does all this rearranging of the chairs mean that Detroit is now the promised land? Of course not—it is anything but. For most residents, life is difficult at best. Exhibit A would be the impact of fourteen years of control of Detroit Public Schools by the state government in Lansing. The results have been disastrous, despite the best efforts of Detroit's teachers who give new meaning to the term public servants.

The physical devastation of the city is breathtaking. Much of what you have read from self-proclaimed Detroit haters and defenders is accurate. The debt accumulated with the aggressive help of Wall Street over the decades is staggering. Repeated lay-offs of city workers have severely curtailed even basic services.

To be sure, corruption and incompetence from elected officials has played a role. It has made already bad situations even worse than they needed to be. It has diverted needed resources to addressing the corruption instead of dealing with other problems. And it has been like catnip to whites who like to argue that it proves Detroit can't govern itself.

None of Detroit's problems showed up suddenly. Seen from a long term perspective, the bankruptcy filing comes into clearer focus. As with Ronald Reagan's firing of unionized air traffic controllers (PATCO) or the Supreme Court's validation of big money control of politics in *Citizens United*, Detroit's bankruptcy is the *effect* of democracy's power already lost—not the cause of it. It is but one more small step in a decades-long process.

And yes, race does have everything to do with it. There are three counties that make up the political economy of Southeast Michigan. Wayne County encompasses Detroit but also includes large suburbs such as Dearborn, Livonia (the most segregated city of more than 200,000 residents in the entire country) and most of the affluent Grosse Pointes. Oakland County immediately north of Detroit is the 4th most affluent county of its size in the United States. Nearby Macomb County is predominately working class and the "birthplace" of "Reagan Democrats."

Much of the Detroit punditry one reads or hears conveniently ignores race altogether, concentrating instead on the decline of the domestic auto industry or macro economic trends. Usually when race is included on a list of "causes for Detroit's decline," it is described with weasel words such as "racial tensions" or "the racial divide." Nonsense. What it was and what it remains, is white racism pure and simple. Bloviators love to talk about the "unsustainable legacy" costs of pensions for city workers. They never talk about the "legacy" costs of racism.

Is Detroit just a perfect storm of forces that hit a particular place in a particular way such as New Orleans, albeit over a longer time frame? Or is

Detroit the canary in the coal mine that is previewing where the whole country and in some ways the whole world is headed? I have spent a lot of time over the years thinking about that question. Every time I wind up with the same conclusion. Sooner or later, this movie will come to a theatre near you. Either that, or it will open nationwide, that is for the whole country. Dependence on debt, political paralysis that prevents anything being done while the system and its component parts flounder and decay, an obsolete system of organizing work—isn’t that exactly what Detroit has been through over the last 40 years? Add in accelerating ecological catastrophe and you can see that one day we will all be able to say “Ich bin ein Detroiter.”

Whatever the ultimate outcome of Detroit’s municipal bankruptcy drama, we can be certain of one thing. It won’t fix any of the underlying problems of systemic racial, political and economic dysfunction. For that, we will have to rely on ourselves. And more and more, we are doing just that. For those of us who believe the current dominant order is not only not working, but a menace to life on earth, Detroit is exactly where we want to be. We are proud and grateful to be in the place and the time where we get to have a part in making another world happen.⁸

In light of the sociological and political economic analyses summarized above – and, crucially, entirely left out of the public ‘debate,’ such as it is, orchestrated by state officials and major Detroit media organizations around this case and the wider ‘restructuring’ of Detroit – we can now briefly revisit *Hurlbut, supra*, the Michigan Supreme Court’s heroic late-19th century vision of democracy in its time, and also begin to see how it relates to our own.

Hurlbut arose out of the era of U.S. corporate ‘robber barons’ that bears uncomfortable similarities to the vision and apparent direction of ‘restructuring’ via emergency management, lacking democratic accountability, input, transparency or a commitment to justice for the most vulnerable populations who are most directly and personally affected by the momentous decisions being taken. In that era of unprecedented growth of corporate wealth, influence and political power, the essential

⁸ <http://www.alternet.org/economy/real-story-detroits-economy-good-things-are-really-happening-motowi>

reality driving events was the enormous amounts of money to be made by the ‘development’ and rationalization of the production system. Three salient characteristics of the late 19th and the early 21st centuries have central importance to the legal environment surrounding this Chapter 9 proceeding, but they are almost never publicly articulated or understood.⁹

- A total absence of any kind of effective control over business dealings, even at their most “ruthless and crooked,” yielding “really spectacular possibilities of corruption;”
- The resulting speculative opportunities for gigantic windfall profit; and consequently
- A “logic of profit-making rather than living,” based on “competence, energy, ruthlessness and greed.”¹⁰ Professor Hobsbawm concludes that via such means “the great capitalists imposed their stamp on their country. ... Once, said the *National Labor Tribune* in 1874 [3 years after the Michigan Supreme Court’s *Hurlbut* opinions] men [sic] in America could be their own rulers. ‘No one could or should become their masters...’ But now ‘these dreams have not been realized ... The working people of this country ... suddenly find capital as rigid as an absolute monarchy.’”

It is hard to conceive of a better framework for understanding the historic appointment of Mr. Orr and his giant law firm employer as Detroit’s ‘emergency’ local government. Executing the sweeping restructuring they evidently contemplate, and doing so by ramming through this Chapter 9 action without any opportunity for a legal test of their underlying authority to do so, will in all likelihood be cited as a precedent for similarly oligarchic campaigns elsewhere.

The relationship between: 1) this Chapter 9 bankruptcy proceeding; 2) emergency management; and 3) restructuring, is like a pyramid. Bankruptcy is the narrowest part of

⁹ This analysis is derived from the discussion of U.S. history in “*The Age of Capital, 1848-1875*,” by Eric Hobsbawm, one of the foremost historians of the modern world, at Pp. 144-45.

¹⁰ Or, as Governor Snyder often calls it, “relentless positive action.”

the edifice, at the top. Restructuring is the broadest segment at the social base of the structure. In between is emergency management, executing (so Plaintiffs in *NAACP* and *Phillips* contend) a structurally flawed, democratically challenged and unconstitutional, top-down ‘restructuring.’ If the lawful constitutional authority of Governor Snyder, Treasurer Dillon, Emergency Manager Orr, Jones Day and their associates is not even permitted to be tested in court before Chapter 9 is applied, the resulting plan of adjustment and the vital restructuring process will lack legitimacy in the eyes of most Detroiters. The plan and proceedings in this Court will fail to achieve its ostensible purposes (regardless of how beneficial the contemporaneous dealings nevertheless prove to be for certain well-connected insiders, as foreseen by Justice Cooley 142 years ago).

Former Michigan state treasurer Robert Kleine articulated the narrower point of efficacy of this action in a recent Detroit Free Press op-ed: “*I do not believe bankruptcy will solve the problem given Detroit’s inadequate tax base. Detroit cannot be a viable city without outside help, which no one is prepared to offer. Detroit’s underlying problems are the result of the downsizing of the auto industry, racial tensions, meaningless jurisdictional boundaries, state neglect and inattention, and the Great Recession. Balancing the books in a technical sense will not address any of these fundamental issues.*”¹¹

In addition to such concerns of effectively responding to Detroit’s fiscal travails, there are the broader questions of economic and social justice amid pressing concerns like social austerity, anti-democratic voter suppression and opportunistic exploitation. As

¹¹ <http://www.freep.com/apps/pbcs.dll/article?AID=2013308040048>

Sam Riddle told the Court on September 19, emergency management is the greatest institutionalized and racist poll tax in U.S. history. The point of traditional poll taxes in the era before the Civil Rights Act of 1964 and the Voting Rights Act was, of course, never to raise revenue; it was to suppress democracy. And that is the point here, under the guise of a financial ‘emergency’ that is selectively attributed to only the least powerful actors in a great drama.

This Honorable Court can and, it is respectfully submitted, should take judicial notice of the notorious racial disparity between white Michigan and black-and-brown Detroit. (see, e.g., the attached map of 2010 census data) This disparity is the context for Governor Snyder’s emergency management policies, especially as applied to Detroit by Jones Day with its partner Kevyn Orr embodying the firm’s local government/client.

Under these conditions, emergency management is effectively the 21st century equivalent of 20th century *de jure* Jim Crow racial segregation and discrimination – a new American apartheid. In the social context of Michigan it is legalized discrimination by both race and poverty. At an absolute minimum, Plaintiffs in the pending district court cases should be allowed to litigate constitutional claims arising out of this series of transactions and occurrences, before the powerful forces orchestrating the emergency-managed restructuring and bankruptcy are allowed to have their way.

III. THE ANXIETY AND FEAR SUFFERED BY PENSIONERS IS A RESULT OF MISUNDERSTANDING THE NATURE OF THE THREAT POSED TO PUBLIC PENSION SYSTEMS, AND IT WILL NOT BE AGGRAVATED OR PROLONGED BY A REASONABLE STAY OF THIS CHAPTER 9 BANKRUPTCY PROCEEDING.

At the September 19 hearing, the Court expressed a concern that staying the bankruptcy would prolong Detroiters' anxiety regarding its eventual resolution and the effects on our lives.

Emergency Manager Orr recently shed some new light on the perfectly understandable human fears expressed in this Court on September 19 by current pensioners, whose vested rights and income necessary for survival in any sense approaching human dignity are embodied in their constitutionally protected pensions. He announced that he does not propose to terminate or slash existing, vested pensions.¹²

The City of Detroit and its eminent counsel/emergency manager and the Governor were never likely to be able to take away or even diminish such existing pensions anyway. (See, e.g., the State Attorney General's statement in this matter, as well as protection for public pensions in the Michigan Constitution, Art. IX, Sec. 24, and the Tenth Amendment to the United States Constitution.)

Upon information and belief, and supported by this latest announcement, Governor Snyder and his chosen emergency manager/restructuring counsel intend to achieve future savings and obtain current capital for investment purposes to partially fund the restructuring they contemplate (including but certainly not limited to funding a new 'defined contribution' retirement system), not by robbing current pensioners, but rather by eliminating the traditional 'defined benefit' system for current employees who

¹² <http://www.detroitnews.com/article/20130926/METRO01/309260108/Orr-will-try-freeze-Detroit-pension-fund?odyssey=mod|breaking|text|FRONTPAGE>

have not yet vested. What they apparently intend to do is take control of the total assets of the city's retirement systems – a much greater financial prize than the value of currently vested and payable benefits alone – and use them to fund the large-scale restructuring of operations and policies around this municipal bankruptcy. (This will enable them to reward their friends, as foreseen by Justice Cooley.)

It was the lack of candor or transparency by the Governor, the emergency manager and their restructuring counsel in refusing to forthrightly state their purposes and the means they intend to employ to achieve them – and crucially, together with the very real threat to health care benefits for those not yet eligible for Medicare, benefits which were also earned but lack state constitutional protection - that has been creating such an intense fear among the City of Detroit's retired current pensioners.

When the debtor's counsel stated at the September 19 hearing that the overwhelming majority of the concerns related to such existing pensioners' legitimate rights and fears, he was a) distracting from the fact that he did not respond at all to the request for stay – or any of the many other issues raised such as the unconstitutionality of the emergency manager statutes;¹³ and b) continuing to hold the essentially empty threat over the pensioners' heads.

Staying the Chapter 9 case to allow the underlying constitutional issues to be adjudicated in U.S. District Court will not prolong this anxiety. Holding the balance true between the human and constitutional rights of Detroiters and the legitimate interests of

¹³ Counsel's Jones Day partner Kevyn Orr expressly recognized the existence of these constitutional objections in his internal Jones Day e-mails in January and February, as the emergency manager and restructuring counsel contracts were being negotiated with the state, while he was acting as a dual agent for both Jones Day and the state. (See attachments to the attached objections) Counsel's failure to respond to these issues, after they were raised repeatedly by objecting Detroiters on September 19, indicates that the state/Jones Day team would rather avoid the subject. Among many other pernicious results of this studied silence on the real issues, it would not alleviate any Detroiters' anxiety about the restructuring process for the courts to continue to allow them to do so.

WHEREFORE, Thomas Stephens respectfully requests that the captioned bankruptcy proceedings should be stayed, and this Honorable Court should formally request expedited consideration of all pending litigation raising legal and constitutional challenges to the underlying authority of Governor Rick Snyder, Treasurer Andy Dillon, the State of Michigan, Emergency Manager Kevyn Orr and Restructuring Counsel Jones Day, including but not limited to *Phillips, et al v Snyder, et al, Case No. 2:13-cv-11370* and *Detroit Branch NAACP, et al v Snyder, et al, Case No. 13-CV-12098* (Hon. George Caram Steeh), before proceeding with the bankruptcy case.

Respectfully Submitted,

/s/Hugh M. Davis
Constitutional Litigation Associates, PC
Counsel for Interested Party Thomas Stephens
450 W. Fort St., Ste. 200
Detroit, MI 48226
(313) 961-2255/Fax: (313) 961-5999
conlitpc@sbcglobal.net

CERTIFICATE OF SERVICE

Jillian R. Rosati, says that on this 30th day of September, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification to all e-filing users.

/s/Jillian R. Rosati
Jillian R. Rosati